Supreme Court, U.S.
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No. 98-2002

IN THE

Supreme Court of the United States

STEVEN BALOGH and
KENOVA CONSTRUCTION CORPORATION,

Petitioners,

v.

RICARDO RAMOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS FOR THE
THIRTEENTH JUDICIAL DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS ACTUALLY PRESENTED FOR REVIEW

Does use of the mails to provide notice constitute a violation of a party's due process rights?

Does permitting a trial court to determine credibility of evidence in a swearing match violate a party's due process rights?

Can contentions which are being raised for the first time before this Court be the proper subject for review?

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STATEMENT OF THE CASE

The case at bar is **not** about litigants who fail to receive notice of a trial setting. Rather, the case at bar involves litigants who deliberately chose ***not*** to appear at trial, intending instead to fight the resulting judgment on jurisdictional grounds in their home forum. When they received a copy of the resulting judgment, they possessed second thoughts concerning this strategy, and then belatedly claimed lack of notice of the trial setting. The various Texas Courts required the litigants to accept responsibility for their conduct. Nothing presented herein demonstrates that the United States Constitution relieves a party from his responsibility for his own conduct.

Petitioners' abuse of the legal system began early.[1] They refused to accept service of process by mail. When a process server was hired, Petitioners calculatedly attempted to avoid service of process by deliberately lying to the process server. When the process server was able to complete his duties despite Petitioners' falsehoods, Petitioners filed an answer, frivolously claiming that Texas courts lacked personal jurisdiction.[2] Respondent then requested a telephonic docket control conference to set the case for trial, and the trial court accordingly ordered the conference to be held. Petitioners admit receiving this order, setting the conference.

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1. Petitioners' claim that they "allegedly" stopped payment of the check contradicts their prior sworn statement, wherein they admitted stopping payment on the check. App. 55, ¶ 10.

2. When a party travels to Texas, and while there, makes misrepresentations to a Texas resident, resulting in foreseeable harm to the Texas resident in Texas, Texas naturally possesses personal jurisdiction over the non-resident defendant.

In their answer, Petitioners violated Tex. R. Civ. P. 57 by failing to provide their telephone number therein. Respondent's counsel could not contact Petitioners because his legal assistant did not possess Petitioners' telephone number. Furthermore, the statement that Respondent and/or Respondent's counsel knew Petitioners' telephone number was determined to be false by the trial court.[3]

Pursuant to well established local practice, the legal assistant thought that Petitioners would call in, or otherwise make their presence known at the docket control conference. However, they did not; indeed, they completely ignored the trial court's notice. Unwilling to be hostage to recalcitrant litigants, the trial court and Respondent's counsel nevertheless proceeded with the docket control conference despite Petitioners' absence. At the docket control conference, the case was set for trial. Furthermore, as Petitioners admit, the order setting the docket control hearing warned Petitioners that trial would be set at this hearing.

A docket control order was subsequently entered, reflecting the various court imposed deadlines and trial date. **This order was mailed to Petitioners not once, but twice**. First, the trial court's coordinator sent a copy of this order to both Respondent and Petitioners.[4] Second, Respondent's counsel *also* sent a copy of this order to Petitioners.

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3. Thus, Petitioners' frequent allegations concerning misrepresentations in this regard are patently false.

4. Respondent admitted receiving a copy of this order from the court coordinator.

In order to prepare for trial, Respondent's counsel sent requests for admission to Petitioners. In response, Petitioners' general counsel wrote back, implying that Petitioners knew of the trial setting, but intended to default, and contest the resulting collection efforts in Florida.[5]

The trial court called the case for trial on the date contained in the docket control order. At that time, the trial court expressly found that Petitioners were provided notice of the trial date. App. 31. While Respondent and his witnesses appeared, Petitioners, pursuant to their collection contest strategy, defaulted. Respondent proceeded to present evidence, demonstrating both Petitioners' liability and the damages he suffered. A copy of this judgment was mailed to Petitioners.

After receiving the judgment, Petitioners apparently had second thoughts about their strategy, and filed a motion for new trial, primarily asserting lack of notice. Respondent responded to this motion, presenting affidavits concerning the mailing of the docket control order, and Petitioners' collection contest strategy. Based on such conflicting evidence,[6] the trial court found that Petitioners had indeed

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5. Petitioners' frequent complaints concerning mediation are misplaced. First, Petitioners themselves completely failed to take any steps to mediate the case, and should not be able to avoid responsibility by shifting it to Respondent. Second, under Texas law, mediation is for the benefit of the trial court, and thus, the trial court can waive any requirement for mediation. *Cf. Smith v. Mike Carlson Motor Co.*, 918 S.W.2d 669 (Tex. App. — Fort Worth 1996, no writ).

6. Under Texas law, evidence of mailing creates a presumption of receipt. *Cliff v. Huggins*, 724 S.W.2d 778, 78 (Tex.

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received notice, and therefore was not entitled to a new trial. App. 34.

REASONS FOR DENYING THE WRIT

I.

THE REQUIREMENTS OF DUE PROCESS WERE SATISFIED.

Due process requirements are satisfied is a party "has reasonable notice and reasonable opportunity to be heard and to present his claim or defense." *Dohany v. Rogers*, 281 U.S. 362, 366, 50 S. Ct. 299, 302, 74 L. Ed. 904 (1930). "The kind of notice required is one reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action." *Bank of Marin v. England*, 385 U.S. 99, 104, 87 S. Ct. 274, 277, 17 L. Ed. 2d 197 (1969). In this regard, this Court has consistently held that notice by mail is sufficient to satisfy due process. *Travelers Health Ass'n v. Commonwealth of Virginia*, 339 U.S. 643, 650-51, 70 S. Ct. 927, 931, 94 L. Ed. 1154 (1950); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 160, 90 L. Ed. 95 (1945); *see also Sheiner v. City of New York*, 611 F. Supp. 172, 177 (E.D.N.Y. 1985); *Thompson v. Thompson*, 99 N.M. 473, 660 P.2d 115, 118 (1983); *Morris v. State*, 894 S.W.2d 22,

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(Cont'd)

1987. While such a presumption may be rebutted, the facts which created the presumption remain in evidence, and can be relied upon by the trial court in finding actual receipt, despite self-serving, conclusory denials to the contrary. *Stanley Stores, Inc. v. Chavana*, 909 S.W.2d 554, 559 (Tex. App. — Corpus Christi 1995, writ denied).

25 (Tex. App. — Austin 1994, writ dism'd w.o.j.). Indeed, this Court has demonstrated a preference for providing notice by mail:

> As noted by the Court of Appeals, and as we noted in *Mullane* [*v. Central Hanover Bank*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)], the mails provide an "efficient and inexpensive means of communication, *id.* at 319, 70 S. Ct. at 659, upon which prudent men will ordinarily rely in the conduct of important affairs. Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defendant despite a continuing interest in the resolution of the controversy.

Green v. Lindsey, 456 U.S. 444, 455, 102 S. Ct. 1874, 1880, 72 L. Ed. 249 (1982).

In the case at bar, Petitioners received notice by mail of the trial setting not once, but twice. They received it first from the trial court. Second, they also receive it from Respondent's counsel. Rather, as the trial court found, Petitioners deliberately chose not to attend trial. Clearly, Petitioners' due process rights were not violated. *Green v. Lindsey*, *supra*; *Travelers Health Ass'n v. Commonwealth of Virginia*, *supra*; *International Shoe Co. v. State of Washington*, *supra*; *Sheiner v. City of New York*, *supra*; *Thompson v. Thompson*, *supra*.

Furthermore, even assuming that Petitioners were the unluckiest litigants in the world by failing to receive two different notices of the trial (especially since they have admitted receiving all other correspondence regarding this litigation), their due process rights were not violated. As previously noted, due process is satisfied when a party has reasonable notice and reasonable *opportunity* to be heard and to present his claim or defense. *Dohany v. Rogers*, *supra*. Petitioners knew of the docket control conference, and, contrary to their representations before this Court, knew that as a result of such conference, the case would be set for trial. Petitioners could have contacted the trial court's coordinator (or contacted the clerk's office at a later date when they failed to receive anything). Indeed, well established practice dictates that if a party is not contacted for a docket control conference, he must contact the court, and such practice indicates that Petitioners were not deprived of due process. *Anderson National Bank v. Luckett*, 321 U.S. 233, 244, 64 S. Ct. 599, 605, 88 L. Ed. 2d 692 (1944) ("The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process."). Furthermore, Petitioners admitted that they were experienced litigants, thus knew they could not stick their heads in the sand.

Petitioner's real complaint lies with the common law system. In other words, Petitioners are complaining of the system which permits trial courts to make factual determinations, when they claim lack of notice but circumstantial evidence shows to the contrary. However, this task must be entrusted to someone, especially when the evidence is conflicting. Thus, such a system does not violate due process.

II.

ARGUMENTS CANNOT BE PRESENTED FOR FIRST TIME BEFORE THIS COURT.

Before this Court can address a federal law contention, the state courts below must have been fairly appraised of it. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed. 2d 474 (1987). "It is our practice, when reviewing decision by state courts, not to decide federal claims that were not 'pressed or passed upon' below." *Clark v. Jeter*, 486 U.S. 456, 459-60, 108 S. Ct. 1910, 1913, 100 L. Ed. 2d 465 (1988). Furthermore, while magic words are not required, the state court must be fully and squarely appraised of the contention. *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78, 108 S. Ct. 1645, 1650, 100 L. Ed. 2d 62 (1988). Indeed, when the state courts are silent on a federal question, this Court assumes that such question **was not** properly presented. *Adams v. Robertson*, 520 U.S. 83, 85, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997).

In addition to their due process claims, Petitioners are claiming herein that any finding of waiver of constitutional rights by Texas courts was improper. Furthermore, Petitioners are claiming that the Texas courts improperly shifted the burden of proof, and that federal burden of proof was binding on state courts. However, these assertions are being raised for the first time before this Court. None of these assertions were raised before the trial court. None of these assertions were raised before the court of appeals, and its operative opinion is completely silent on these issues. None of these assertions were raised before the Texas Supreme Court, either in the initial petition, or in the motion

for rehearing. Accordingly, such contentions are not be presented to this Court as a basis for review. *See*, *e.g.*, *Riggins v. Nevada*, 504 U.S. 1127, 1133, 112 S. Ct. 1810, 1814, 118 L. Ed. 2d 479 (1992); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 50-51, 100 S. Ct. 2009, 2023, 64 L. Ed. 2d 702 (1980); *Dothard v. Rawlinson*, 433 U.S. 321, 324 n.1, 97 S. Ct. 2720, 2724 n.1, 53 L. Ed. 2d 786 (1977).

CONCLUSION

Instead of casting aspersions on Respondent, Petitioners need only look in the mirror to determine who is responsible for their own predicament. They knew of the trial date, and yet deliberately chose not to attend the trial. They possessed the opportunity to be informed of the trial date, and yet deliberately chose not to contact the court coordinator. When parties choose not to attend trials, default judgments are rendered, and the litigants must accept responsibility for their conduct (and the judgment).

Respectfully submitted,

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